

No. 787.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Plaintiff in Error,
vs
E. F. WILCOX,
Defendant in Error.

Brief on Behalf of Defendant in Error

OLIVER P. EVANS,
Solicitor for Defendant in Error.

Upon Writ of Error to the Circuit Court of the United States
for the Southern District of California, in and
for the Northern Division.

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Brief on Behalf of Defendant in Error.

The Court below sustained a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. This ruling alone is assigned as error. Counsel for plaintiff in error presumably know that only the facts stated in the complaint can be referred to, considered, or reviewed on this appeal. But notwithstanding this presumed knowledge matters dehors the record constitute the principal part of their so called "state-

ment of the case." This should not be so, and it necessitates a full statement on the part of defendant in error. It appears from the complaint (Tran. pp 5, 6 and 7) that the material facts are :

First: That Lieutenant (now Captain) E. F. Wilcox of the 6th U. S. Cavalry, did render his account to the United States in the sum of \$200.00, the alleged value of a certain horse claimed by him "to have been *lost* in the military service of the United States" on the 6th day of April, A. D. 1889.

Second: "Which account was *duly* presented to "the War Department; and (the) claim (was) numbered 108,188."

Third: "That afterward, to-wit, on the 7th day "of December, 1896, said account was *duly settled* "by the Auditor of the War Department, and a certificate of settlement numbered 1,737 *duly* issued "by the said Auditor * * * for the said sum of "\$200.00."

Fourth: "Which sum of \$200.00 was paid to "said defendant on or about the 14th day of December, 1896."

Fifth: "That on the 28th day of May, 1897, "(more than 5 months thereafter, or *after payment*) "the Comptroller of the Treasury directed a revision of said claim * * and disallowed said claim "for the reason that the loss of the said horse * * "was not without fault on the part of said defendant; and the said defendant by his negligence

“contributed to the loss of said horse, and thereby
 “was not entitled to recover for said loss, under the
 “act of March 3, 1885. (23 Stat. at Large, p 350.)”

Sixth: “That thereafter, to-wit, on the 24th day
 “of May, A. D. 1898, acting on the direction of the
 “Comptroller of the Treasury, the Auditor of the
 “War Department, at Washington, D. C., restated
 “said claim * * and issued a new certificate num-
 “ber 4,867, raising a charge” of \$200.00 against de-
 fendant by reason of which he became indebted to
 the plaintiff in the sum of \$200.00.

Was the demurrer properly sustained?

The statement by counsel for plaintiff in error contains many *errors* and other matters, not only not in the complaint but the facts which are in the complaint are misstated in such a way as, possibly, to mislead the Court—although not so intended.

In counsel’s “Statement of the Case,” it is said
 “Lieutenant E. F. Wilcox, now Captain Wilcox, *filed*
 a claim in the Third Auditor’s office (now the office
 of the Auditor of the Interior Department) on
 April 25th, 1889.” But the “complaint” only
 alleges, in this behalf, that said defendant “as such
 lieutenant, did render his account to the United
 States” and nothing is said as to where, when, or in
 what office it was filed, or that it was ever filed. Pre-
 sumably whatever was necessary to be done was
 done as he “did render his account to the United

States" and was paid \$200.00. Counsel draw on their imagination for particulars.

In the "Complaint" the language is "the value of a certain horse then and there claimed by said defendant to have been *lost* in the military service."

Counsel prefer that the horse should have been *killed* not *lost*, so they say "the value of a horse belonging to him and alleged to have been *killed*." But they are not satisfied merely to have the animal *killed* and not *lost*, as alleged in the complaint, so they draw upon their imagination—or have a story invented as to *how* the horse was killed, viz: "shot by order of claimant"—the defendant in this action. Remember this is pure invention of counsel for plaintiff in error—not one word about it in the complaint.

"It was not necessary that the horse should have been turned into a corral"—say counsel. Well! perhaps it was not—the complaint is silent on the subject. If counsel in their fiction—(any matter stated by them outside of what is alleged in the complaint must, for the purpose of this argument, be here treated as mere fiction) did not like the idea of having the horse hurt in a corral—they might have had it hurt in some other way—so long as they keep to the main idea that he was shot or killed by Capt. Wilcox or by his order. They might as well as not have thrown in a little malice and pictured the killing to have been most brutal. However

they are not proud of the yarn as they tell it and have it printed in quotation marks as though it had been originally told by some one else. It may have been so, who knows? The complaint is silent upon the subject. But some things are certain. The claim made by Lieutenant Wilcox was *paid* on the 14th day of December, 1896, and no attempt by the Comptroller to review, or restate it was made until long afterwards, and no claim is now made that there was any fraud or mistake in connection with its allowance or payment. Counsel's statement that it was not paid until December 1897 is wrong, it was paid December 14th, 1896.

The Argument.

The novelty of the suggestion, that without any notice, or hearing, the Comptroller of the Treasury, or the Auditor of the War Department, or both acting together, could arbitrarily, and of their own motion, revise and reject a claim that had been duly presented, allowed and paid, is obvious.

The further suggestion that they could, in like manner, raise "a charge of two hundred (\$200.00) dollars against said defendant; by reason of which he became then and there indebted to plaintiff in the sum of \$200.00" is certainly supremely absurd.

Such proceedings would not be "*due process of law.*"

All presumptions are to be indulged in favor of

the claim that was allowed and paid. Presumably ample evidence was presented to support it, and that all the proceedings leading up to and including its payment were regular. The complaint fully supports this idea, and nothing to the contrary is suggested. On the other hand, no suggestion even, is made that the defendant ever had the slightest notice of the subsequent proceedings or any chance whatever to be heard or make a defense to the arbitrary proceedings of the Comptroller had "on his own motion." But still worse than all this is claimed. The loose statements of the Comptroller's alleged reasons for what he did to bind the defendant, are not stated by way of allegations in a pleading to be now controverted or tried—but rather by way of recital and notice—that the plaintiff has a final judgment which must be presently paid. The suggestion is repugnant to common sense and all our ideas of justice and fair dealing. It will not do.

The act of March 3, 1885, under which defendant presented his claim which was allowed and paid, is copied on page 3 of plaintiff's brief and the first *proviso* therein contained is

"That any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be reopened or considered."

Conceding for the moment, that the proceedings had on the claim of Lieutenant Wilcox, could have

been arrested and reviewed at any time by proper proceedings had before the claim was finally allowed and paid, it must also be conceded that, under this act, it was too late after the money had been paid.

The head note to the case of *United States vs. Olmsted*, 106 Federal Reporter, 286, reads:

“Where the claim of an army officer against the government for the value of personal property lost in the service, presented under act March 3, 1885 (23 Stat. 350), which provides that ‘any claim which shall be presented and acted on under authority of this act shall be held as finally determined and shall never thereafter be reopened or considered’ was allowed by the Auditor for the War Department, and paid, the government cannot recover the amount so paid from such officer upon a petition showing that the claim was subsequently revised by the Comptroller and disallowed because of the insufficiency of the proofs, and that the Auditor thereafter settled the claim, and charged the amount back to the officer, there being no allegation of fraud or mistake, or that the claim was not in fact one properly allowable under the Statute; and especially where it is not shown that the officer was advised of the action taken after the payment was made.”

The opinion of the Court is much fuller than the head note, and fully sustains the ruling of the Court below in case at bar.

The act of March 3, 1885, recites "That the
 "proper accounting officers of the treasury be, and
 "they are hereby, authorized and directed to examine
 "into, ascertain, and determine the value of the pri-
 "vate property belonging to officers * * which
 "has been, or may hereafter be, lost or destroyed in
 "the military service, under the following circum-
 "stances * * Where such loss or destruction was
 "without fault or negligence on the part of claimant.
 " * * And the amount of such loss so ascertained
 "and determined shall be paid out of any money in
 "the treasury not otherwise appropriated, and shall
 "be in full for such loss or damage; *Provided, That*
 "any claim which shall be presented and acted on
 "under authority of this act *shall be held as finally*
 "*determined, and shall never thereafter be reopened*
 "*or considered:*" etc.

The claim of Wilcox was presented, acted on, and paid, under this Act. Could the Comptroller after once acting upon the claim, and *after payment* act on it again and disallow it?

It is alleged in the complaint that—he—the Comptroller "disallowed said claim of defendant, for the reason that the loss of said horse on which the said claim of defendant, was based was not without fault on the part of said defendant."

No fact is pleaded calling for an answer. It is suggested that the Second Comptroller should have acted upon the claim before it was, or could be paid.

It is not alleged that he *did not* so act. Perhaps he did. We certainly have a right to assume that he did,—because the Auditor of the War Department *duly settled* the claim, *duly issued* the certificate on the 7th day of December, 1896, and it was paid December 14th, 1896. Then we must presume that all “the proper accounting officers of the treasury” contemplated by act of 1885, had acted before payment was made. If so then it was “acted on under authority of this act (and) shall be held as finally determined, and shall never thereafter be reopened or considered”—no, not even by this action. The Comptroller could not under this act, “disallow” the claim—or direct “the Auditor of the War Department at Washington, D. C.” (or at any other place) to “restate said claim of defendant” or raise “a charge of \$200.00 against said defendant.”

Counsel for plaintiff in error on second page of their brief, state, in quotation marks, what they claim was the Comptroller’s “*reasons*” for his action in trying to open or disallow the claim after it had been paid, or as they put it, “on May 28, 1897, the Comptroller of the Treasury revised said account, on his own motion, and disallowed the amount which had been allowed by the Auditor, for reasons stated as follows: and then profess to quote something *not in* the complaint, and we make this supposition by way of argument. Suppose the facts in the case were or had been submitted by the Third Auditor to the Second Comptroller of the Treasury,

March 7, 1890, with the information, that the claim seemed to him to come within the provisions of the Act of March 3, 1885. That he approved the claim and then referred the papers to the Secretary of War for his action, under the Act of 1885. And then that the Secretary of War had returned the papers to the accounting officers of the Treasury, August 24, 1896, with the following indorsement:

Under the provisions of the Act of Congress, approved March 3, 1885, Stats. 23, p. 350, Chap. 335, it is certified that the horse men mentioned in the within claim is reasonable, useful, necessary and proper for an officer while in quarters, engaged in the public service in the line of duty.

And then that the claim was examined and settled December 7, 1896, by Treasury Certificate, No. 1737, in favor of said officer, for \$200, to be payable out of the appropriation of claims of officers and men of the army, for destruction of private property, Act March 3, 1885.

The allegations of what was done are entirely consistent with the idea that all the accounting officers did their duty. The claim having been paid the presumption is that it was properly paid.

The suggestion that long after the claim was allowed and paid—the Comptroller of the Treasury assumed to disallow it, raises no presumption that

he had not previously allowed it. This Act is a special Act as to this class of cases, and when any claim "shall be presented and acted on under the authority of this act (it) shall be held as finally determined, and shall never thereafter be re-opened or considered."

What is said by Counsel on page nine of their brief as to what was *not done* by certain officers has no warrant in the complaint. There is no allegation that *these* things were *not* done. The mere fact that the treasury paid the claim raises the presumption—as has been unnecessarily repeated—that all proper officers had acted upon, allowed and approved it. The complaint is fatally defective and no amount of assertion or declamation can cure it. The demurrer was properly sustained. It is said "The money paid to claimant was an unauthorized payment under misconstruction of law." Then why did not the pleader state the facts in the complaint? The money was paid—and presumably properly paid. But Counsel would have the Court presume facts not alleged.

I have examined the authorities cited by Counsel and find nothing therein inconsistent with the order appealed from.

It needs no citation of authority to show that money paid out by the government through mistake can be recovered. But such mistake will not be

presumed—it must *exist*, be properly *pleaded* and *proved*.

It is respectfully suggested that the order overruling the demurrer should be sustained.

OLIVER P. EVANS,

Solicitor for Defendant in Error.